UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

O.B. WILLIAMS COMPANY,

Plaintiff,

v.

S.A. BENDHEIM WEST, INC.,

Defendant / Third-Party Plaintiff,

v.

CARDINAL LG COMPANY, et al.

Third-Party Defendants.

CASE NO. C08-1155JLR

ORDER ON THIRD-PARTY DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the court on the motions for summary judgment filed by Third-Party Defendants Cardinal LG Company and Cardinal Glass Industries, Inc. (collectively, "Cardinal") (Dkt. # 93) and Bent Glass Design, Inc. ("Bent Glass") (Dkt. # 88). Defendant/Third-Party Plaintiff S.A. Bendheim West, Inc. ("Bendheim") opposes

both motions (Dkt. ## 101, 102). Plaintiff O.B. Williams Company ("Williams") filed a memorandum in support of Bendheim's opposition to Cardinal's motion (Dkt. # 104). Having considered the motions, the materials in the record, and all papers filed in support and opposition, and having heard oral argument, the court GRANTS in part and DENIES in part Cardinal's motion for summary judgment (Dkt. # 93), and GRANTS Bent Glass's motion for summary judgment (Dkt. # 88).

I. BACKGROUND[1]

A. The North Seattle Residence Project

This case arises out of an extensive remodeling of an historic home in North Seattle (the "North Seattle Residence Project" or "NSR"). In the mid-1990s, the owner of the North Seattle Residence hired Krakow Jennings, Inc. ("KJI") as the NSR's general contractor. (*See* Mar. 2009 Wick Decl. (Dkt. # 38) ¶ 2.) KJI then hired Williams as a subcontractor to construct and install custom windows and doors. (*Id.*) KJI and Williams chose Bendheim to supply specialty glass for the windows and doors. (Mar. 2010 Wick Decl. (Dkt. # 91) ¶ 4.) For some of the windows and doors, Bendheim was to supply glass that had been laminated for extra strength. (Mar. 2009 Wick Decl. ¶ 8, Ex. F; *see* Mar. 2010 Wothe Decl. (Dkt. # 94) ¶ 4.) The project specifications required the glass to be laminated using a type of polyvinyl butyral ("PVB") sheet laminate having the brand name SAFLEX. (Mar. 2010 Wick Decl. ¶ 4.) Williams communicated these

[1] The facts that follow are largely undisputed and, where disputed, are viewed in the light most favorable to Bendheim.

requirements to Bendheim in the form of typed and hand-written product orders, letters, telephone conversations, and other correspondence from mid-1997 through mid-2001. (*See* Mar. 2009 Wick Decl. at 2-7.)

In June 1998, Williams and Bendheim negotiated a ten-year warranty on the laminated glass that Bendheim provided for the NSR. (Mar. 2009 Jayson Decl. (Dkt. # 36) ¶¶ 3-5.) In relevant part, this warranty states:

> S.A. Bendheim West warrants its laminated glass products ordered for North Seattle Residence project for a period of ten years against de-lamination which materially obstruct [sic] vision through the product. Such warranty is made only to O.B. Williams Company. This warranty shall not apply to . . . any product which has been subject to accident, negligence (in whole or in part of others), alteration, abuse or misuse.
>
> S.A. Bendheim West's sole and exclusive liability and purchaser's sole and exclusive remedy under this warranty shall be limited to replacement of defective product F.O.B. the shipping point nearest the installation or, at Bendheim West's sole option, to refund the purchaser's invoice price.
>
> > This warranty is expressly in lieu of all other warranties, expressed or implied, including the warranty of merchantability and fitness for purpose and all other obligations and liabilities on Bendheim West's part and Bendheim West neither assumes, nor authorizes any other person to assume for Bendheim West, any other liability in connection with sale of the product. Neither Bendheim West nor any of its authorized representatives shall have responsibility nor have any liability for commercial loss, or special, indirect, incidental or consequential damages, or for costs of removal or installation including labor costs of the product, defective or otherwise.

(*Id.* Ex. 2 (capitalization altered for readability).)

Bendheim ordered the raw sheets of glass for the NSR from Schott Corporation ("Schott"), a glass manufacturer in Germany. (*Id.* ¶ 2.) Because Bendheim did not have

its own lamination capabilities, Bendheim subcontracted the lamination of the glass to two vendors: Cardinal and Bent Glass.[2]

1. Cardinal Shipments

From March 1998 through July 1999, Bendheim contracted with Cardinal to laminate and cut the glass for the NSR. (*See generally* Mar. 2010 Wothe Decl.) Bendheim had Schott ship the raw glass sheets directly to Cardinal. (*Id.* ¶ 5.) Cardinal laminated the glass and cut it into "lites" sized to fit into specific windows and doors at the NSR. (*Id.*; *see id.* Ex. D (Cardinal invoices showing the sizes of lites ordered).) After Cardinal laminated and cut the glass, it shipped the lites to Bendheim, which forwarded them to Williams. (*Id.* ¶ 9.) When Williams received the lites, it visually inspected them and then installed them at the NSR. (Mar. 2009 Wick Decl. ¶ 36.) Although Cardinal provided lites that were precut for specific windows and doors at the NSR, Williams sometimes "shuffled" glass from one window to another or had lites recut by other vendors before installing them. (June 2009 Patterson Decl. (Dkt. # 50) Ex. B ("Wick Dep.") 132:14-136:24, 188:3-190:21; Mar. 2010 Wick Decl. ¶ 5.)

On June 22, 1998, Bendheim and Cardinal adopted a ten-year warranty that is nearly identical to the warranty Bendheim provided to Williams. (Mar. 2009 Jayson

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[2] Cardinal contends that an "unknown" third supplier provided additional glass which was laminated with liquid resin laminate. (Cardinal Mot. at 7 (citing Mar. 2009 Wick Decl. ¶ 6; March 2010 Wothe Decl. ¶ 17 & Ex. E).) Cardinal relies upon a stack of documents which its plant manager, Michael Wothe, states he obtained from David Wick, Williams's president. (*Id.*) Cardinal does not explain how the documents relate to one another or how they support its contention. These unexplained documents do not establish an absence of a material fact regarding the provenance of the liquid-resin-laminated glass, particularly where Bendheim asserts that it obtained laminated glass for the NSR only from Cardinal and Bent Glass.

Decl. ¶¶ 4-5.) The two warranties differ only in that "Cardinal" is substituted for "S.A. Bendheim West," and "S.A. Bendheim West" is substituted for "Williams." (*Compare id.* Ex. 2 *with id.* Ex. 3.[3]) According to Donald Jayson, a principal of Bendheim, Bendheim and Cardinal fashioned their warranty so that, if a defect was found in the laminated glass, Bendheim could "expect that Cardinal would resolve the issue through its warranty." (June 2009 Jayson Decl. (Dkt. # 53) ¶ 3.)

When it inspected Cardinal's initial shipments of glass, Williams found that some of the lites were missing and others were broken. (*See* Mar. 2009 Wick Decl. ¶¶ 17-26.) Bendheim and Cardinal replaced the missing or damaged lites. (Mar. 2009 Jayson Decl. ¶ 5; Mar. 2010 Wothe Decl. ¶ 10.) Aside from these initial problems, Cardinal's glass passed Williams's visual inspection. (*See* Mar. 2009 Wick Decl. ¶ 36.) Cardinal provided its last shipment of glass for the NSR on July 7, 1999. (Mar. 2010 Wothe Decl. ¶ 10.)

2. Bent Glass Shipments

From December 1999 through May 2001, Bendheim contracted with Bent Glass to laminate the glass for the NSR. (Mar. 2010 Lerner Decl. (Dkt. # 90) ¶¶ 7-15.) Bent

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[3] For example, the first paragraph of the Cardinal-Bendheim warranty states:

> CARDINAL LG (CARDINAL) warrants its laminated glass products ordered for S.A. Bendheim's North Seattle Residence project for a period of ten years against delamination which materially obstruct [sic] vision through the product. Such warranty is made only to S.A. Bendheim West. Inc. This warranty shall not apply to . . . any product which has been subject to accident, negligence . . . , alteration, abuse or misuse.

(*Id.* Ex. 3.)

Glass laminated the glass sheets, but, unlike Cardinal, it did not cut the glass into lites. (*Id*. ¶ 4; April 2010 Jayson Decl. (Dkt. # 98) ¶ 12.) Instead, Bent Glass shipped the laminated glass sheets directly to Williams, which inspected them and had them cut into lites. (Mar. 2010 Wick Decl. ¶ 6.) Bent Glass provided its last shipment of glass on May 9, 2001. (Mar. 2010 Lerner Decl. ¶ 15.)

Bendheim and Bent Glass did not negotiate a specific warranty for the glass used in the NSR; instead, they used Bent Glass's standard one-year limited warranty, which Bent Glass had provided to Bendheim in "hundreds" of prior orders. (*Id*. ¶¶ 7, 9.) According to Bent Glass's president, Steven Lerner, Bendheim did not seek an extension of the one-year warranty term for the NSR, and Bent Glass was not aware of Bendheim's ten-year warranty to Williams. (*Id.* ¶ 9.) Thus, Bent Glass's warranty to Bendheim did not mirror Bendheim's warranty to Williams. Bent Glass's warranty provided as follows:

> Bent Glass Design, Inc. warrants its laminated glass products for a period of one (1) year from date of manufacture against defects in material or workmanship, which result in edge separation, let-goes, or delamination. In the event of a failure of any product, Bent Glass Design, Inc. may supply a comparable product, no charge, F.O.B. nearest common carrier terminal to place of installation, or Bent Glass Design, Inc. may, at its option, refund the original purchase price paid to Bent Glass Design, Inc. for the product. This warranty shall be the purchaser's sole and exclusive remedy for any failure, including any failure resulting from negligence on the part of Bent Glass Design, Inc. its suppliers or employees . . . . Bent Glass Design, Inc. will not pay nor give credit for any incidental, special or consequential damage or injury to person or property, or any other expenses resulting from such failure.

(*Id.* Ex. A.)

In total, Bent Glass supplied about 15 percent of the laminated glass used at the NSR, as measured in square feet. (Mar. 2010 Wick Decl. ¶ 10.) Although the parties

have tried to determine which lites originated from each company, they have so far been unable to do so, in part because Williams recut and mixed the glass. (*See* Wick Dep. 132:14-136:24, 188:3-190:21 (discussing recutting and "shuffling" of lites).)

B. Identification of the Delaminaton and Liquid Resin Laminate Problems

On July 13, 2004, KJI sent a letter to Williams to notify it that some of the lites that it had installed at the NSR were delaminating. This letter states, in relevant part:

> [W]e have noticed delamination occurring on some of the Bendheim glass panes in the windows, doors, transoms, and sidelights that [Williams] provided for the NSR Project. [KJI] has performed a "survey" of its own in an effort to determine the magnitude of the problem, but we are anxious for [Williams] to review this issue with us as well.

(Mar. 2009 Jayson Decl. Ex. 5.) On October 14, 2004, Williams sent a letter to Bendheim to notify it of the delamination problem. This letter states, in relevant part:

> We have been contracted by [KJI] . . . and have been advised that there is a delamination glass issue at NSR. The delamination is apparently occurring on glass panes supplied by you. . . . The preliminary estimate is that, so far, there are roughly eighty lites that have exhibited defects to some degree. . . . [KJI] wants a plan which is acceptable to the Owners and [KJI] for remedying the delaminating glass problem.

(June 2009 Patterson Decl. Ex. A ("Quick Dep.") Ex. 69.) On June 14, 2005, Bendheim sent a letter to Williams in which it acknowledged the delamination problem. This letter states, in relevant part:

> The samples of laminated Circa 1900 glass you supplied to us from your North Seattle Residence job have been examined by us and shown to be defective. We were unable to discover a cause of the problem which occurred on this job but there is no reason to believe that additional pieces will be affected in the future. We will replace all the currently defective pieces under the terms of our warranty.

(Mar. 2009 Wick Decl. ¶ 38 & Ex. II.) As of May 2006, KJI identified 657 lites that had delaminated. (Mar. 2009 Jayson Decl. Ex. 7 at 7.) KJI estimated that replacing only the delaminating lites would cost an average of $21.19 per lite, plus freight, in addition to $146,626.45 in labor. (*Id.*) According to Williams, however, it was likely that all of the lites—laminated and non-laminated—would need to be replaced in order to ensure that the windows and doors at the NSR continued to match. (*Id.*)

On November 20, 2006, Williams, Bendheim, Cardinal, and the NSR owners' representative met so that the parties could inspect the delaminating glass. (Mar. 2009 Wick Decl. ¶ 39.) After that meeting, Williams provided sample glass from the NSR to Cardinal and later to Seal Laboratories ("Seal"), an independent company. (*Id.* ¶¶ 39-40.) Testing by both Cardinal and Seal confirmed the delamination problem. (*Id.*) Seal's tests, memorialized in a report dated August 22, 2008, also revealed that some of the defective glass was laminated with liquid resin, despite KJI's requirement that the glass be laminated with PVB sheet laminate. (*Id.* ¶¶ 40-41 & Ex. JJ.) The lites laminated with liquid resin had clear tape on the perimeter of the glass which served as a dam to contain the liquid resin. (*Id.* ¶ 40.) According to David Wick, president of Williams, Williams would not have been able to detect the presence of the clear tape and the use of liquid resin on inspection in normal light. (*Id.*) Williams provided Seal's report to Bendheim on October 7, 2008. (*See* Apr. 2010 Rosenberg Decl. (Dkt. # 99) Ex. 5.)

Additional testing performed in January 2010 confirmed that more than 70 of the 2,220 lites installed at the NSR contain liquid resin laminate. (April 2010 Chamberlain Decl. (Dkt. # 100) ¶ 7.)

C. Procedural Background

On June 20, 2008, Williams filed its lawsuit against Bendheim in King County Superior Court. (Williams Compl. (Dkt. # 1 at 3-5).) Williams alleged that Bendheim breached its contracts with Williams by supplying glass that did not comply with the NSR's requirements and that Bendheim breached its warranty to Williams by not replacing the delaminating lites. (*Id.* ¶¶ 3.5-3.6.)

On August 1, 2008, Bendheim removed the case to this court based on diversity jurisdiction. (Not. of Removal (Dkt. # 1 at 1-2).) On September 2, 2008, Bendheim filed a motion to dismiss for lack of personal jurisdiction (Dkt. # 7), which this court denied on October 24, 2008 (Dkt. # 15).

On November 17, 2008, Bendheim filed a third-party complaint against Cardinal (Dkt. # 18), which it amended on December 31, 2008 (Am. 3d-Party Compl. (Dkt. # 30)). On August 5, 2009, Bendheim again amended its complaint to join Bent Glass as a third-party defendant. (2d Am. 3d-Party Compl. (Dkt. # 68).) Bendheim asserts claims for breach of contract, breach of warranty, and "all forms of indemnity and contribution" against both Cardinal and Bent Glass. (*Id.* ¶¶ 22-30.)

On March 4, 2009, Bendheim filed a motion for partial summary judgment against Williams. (Bendheim Mot. (Dkt # 35).) Bendheim contended that Williams's claims were barred by the statute of limitations, and that, in the alternative, Williams was limited to the remedies provided in the warranty agreement. (*See generally* Bendheim Mot.) On April 29, 2009, the court denied Bendheim's motion. (Prior Order (Dkt. # 46).) The court held that, because Bendheim's warranty to Williams was governed by the UCC and

extended to the future performance of the glass, Williams's cause of action for breach of warranty "accrued when it discovered, or should have discovered, that the coating on the glass was delaminating." (*Id.* at 6-7.) As a result, Williams's claims were not time-barred. (*Id.*) The court also denied Bendheim's motion for summary judgment on limitation of remedies because there were genuine issues of material fact regarding whether the delamination was caused by the use of non-SAFLEX laminate and whether the term "laminated glass products ordered" in Bendheim's limited warranty referred to laminated glass in general or specifically to glass laminated with SAFLEX. (*Id.* at 8-9.)

On March 11, 2010, Bent Glass filed its motion for summary judgment. On March 18, 2010, Cardinal filed its motion. On April 4, 2010, Bendheim filed responses to both motions and moved for a continuance of the motions pursuant to Federal Rule of Civil Procedure 56(f). On April 8, 2010, Williams filed a memorandum in support of Bendheim's response to Cardinal's motion. On May 14, 2010, the court heard oral argument on the motions for summary judgment. (*See* Dkt. # 109.) In light of the representation by counsel for Bendheim that certain discovery that was the subject of its Rule 56(f) motion had been completed, the court granted Bendheim's Rule 56(f) motion and ordered the parties to provide supplemental briefing regarding "the effect, if any, of recent discovery on the pending motions for summary judgment." (Dkt. # 110.) The parties completed their supplemental briefing on June 4, 2010.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658. The non-moving party "must present affirmative evidence to make this showing." *Id.* Furthermore, as the Ninth Circuit teaches, "[b]ald assertions that genuine issues of material fact exist are insufficient," and a mere scintilla of evidence supporting a party's position is also inadequate. *Id*.

B. Preliminary Matters Regarding Supplemental Briefing

At the outset, the court addresses the parties' supplemental briefing. The court granted Bendheim's motion for a Rule 56(f) continuance based on Bendheim's counsel's representation that new discovery would be relevant to the instant motions. Specifically, counsel stated that the parties had deposed Mr. Lerner and performed additional physical

testing of the glass. (Hr'g Tr. 3:19-4:16, May 14, 2010 (Dkt. # 116).) Accordingly, the court ordered the parties "to provide supplemental briefing regarding the effect, if any, of recent discovery on the pending motions for summary judgment." (Dkt. # 110.)

With its supplemental brief, Bendheim submitted the Second Declaration of Henry Chamberlain, which discusses his conclusion, based on his testing of the glass and his interpretation of Mr. Lerner's deposition testimony, that it was more likely than not that Bent Glass, rather than Cardinal, provided the glass laminated with liquid resin. (May 2010 Chamberlain Decl. (Dkt. # 113) ¶¶ 3-9 (stating that the test results were consistent with the use of Uvekol laminating resin and that only Bent Glass was known to have used Uvekol during the relevant time period).) Bendheim also submitted excerpts from Mr. Lerner's May 11, 2010 deposition. (Supp. Rosenberg Decl. (Dkt. # 114) Ex. 1.)

The bulk of Bendheim's supplemental brief, however, presents legal arguments regarding Bendheim's claims for contribution and indemnity and its request that the court amend its Prior Order denying its motion for summary judgment. (Bendheim Supp. Br. (Dkt. # 112) at 3-5.) These sections of the brief are not responsive to the court's order to address "the effect, if any, of recent discovery on the pending motions for summary judgment." The court does not, therefore, consider these sections of Bendheim's supplemental brief in evaluating the instant motions, nor does it consider Cardinal's and Bent Glass's responses to these sections of Bendheim's supplemental brief.

C. Breach of Contract and Breach of Warranty Claims

Bendheim's breach of contract claims are based on the provision of glass laminated with liquid resin rather than with PVB laminate. (Hr'g Tr. 14:11-15, 15:6-7,

May 14, 2010.) Its warranty claims are based on the delamination of the lites following installation at the NSR. (*Id.* 15:16-17; 2d Am. 3d-Party Compl. ¶¶ 22-24).

1. Breach of Contract Claim against Cardinal

At the outset, the court addresses Bendheim's breach of contract claim against Cardinal. Bendheim alleged in its complaint that "Cardinal and/or Bent Glass" breached their contracts with Bendheim by failing to supply "acceptable laminated specialty glass." (2d Am. 3d-Party Compl. ¶¶ 25-27.) Bendheim has since narrowed this claim. First, Bendheim represented at oral argument that its breach of contract claim is limited to the 70 lites which were shown to have been laminated using liquid resin laminate rather than PVB sheet laminate. (H'rg Tr. 17:9-17, May 14, 2010.) Bendheim further represented in its supplemental briefing that recent testing of the laminate used in the nonconforming lites indicates that the glass laminated with liquid resin must have been supplied by Bent Glass. (Bendheim Supp. Br. at 1-2 ("the evidence is now compelling that [Bent Glass] provided the glass laminated with liquid resin laminate ultimately installed in the NSR"); May 2010 Chamberlain Decl. ¶¶ 6-9.) Because Bendheim has limited its breach of contract claim to lites which it contends were provided by Bent Glass, the court grants Cardinal's motion for summary judgment on Bendheim's breach of contract claim.

2. UCC Statutes of Limitations

The parties dispute whether the contracts at issue in the instant motions are governed by Washington's Uniform Commercial Code ("UCC"). The UCC applies to contracts for the sale of goods and to mixed contracts for the sale of goods and services if the sale of goods predominates over the sale of services. *Tacoma Athletic Club, Inc. v.*

Indoor Comfort Sys., Inc., 902 P.2d 175, 178-79 (Wash. Ct. App. 1995). The UCC does not apply to contracts for the sale of services or to mixed contracts in which the sale of services predominates over the sale of goods. *Id.*

Cardinal contends that the UCC does not apply to the instant case because it sold lamination services to Bendheim. (Cardinal Mot. at 10.) In response, Bendheim argues that the laminated glass—or at least the laminate—was a good, making the contract subject to the UCC.[4] (Resp. to Cardinal Mot. at 9-12.) Bent Glass does not take a position on whether the UCC applies, but, rather, argues that Bendheim's claims are time-barred regardless of which statute of limitations applies. In general, where there is an issue of material fact regarding whether the contract involves predominately goods or services, the issue must be resolved by the trier of fact. *See Tacoma Athletic Club*, 902 P.2d at 179. Here, however, the court may decide the motion for summary judgment because, regardless of whether the UCC applies, Bendheim's claims for breach of contract against Bent Glass and for breach of warranty against both Cardinal and Bent Glass are time-barred.

a. *Breach of Contract Claim against Bent Glass*

Under Washington's UCC, "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." RCW 62A.2-725(1). A cause of action for a breach of contract claim "accrues when the breach

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[4] Bendheim moves to strike portions of Cardinal's motion and accompanying declaration which discuss whether Bendheim retained title to the glass while Cardinal laminated and cut it. (Resp. to Cardinal Mot. at 9 n.3.) The court reaches the conclusions herein without considering whether Bendheim retained title to the glass.

occurs, regardless of the aggrieved party's lack of knowledge of the breach." RCW 62A.2-725(2). A breach occurs when the goods do not conform to the contract. *See* RCW 62A.2-607. Because the nonconforming aspect of the goods is present when goods are delivered, a breach of contract claim under the UCC generally accrues on delivery. *See Holbrook, Inc. v. Link-Belt Constr. Equip. Co.*, 12 P.3d 638, 641 (Wash. Ct. App. 2000).

Here, if Bendheim's breach of contract claim against Bent Glass is governed by the UCC, it is barred by the statute of limitations. Bendheim's breach of contract claim accrued when Bent Glass delivered the allegedly nonconforming glass to the NSR. As a result, Bendheim's breach of contract claim against Bent Glass accrued no later than May 9, 2001, and the UCC's statute of limitations expired four years later, in May 2005. Because Bendheim did not sue Bent Glass until August 2009, its breach of contract claim against Bent Glass is time-barred.

Bendheim contends that its breach of contract claim is not barred under the UCC because it did not discover that Williams was asserting a claim for breach of contract based on the presence of liquid resin laminate until Williams filed its lawsuit. Bendheim, however, cites to no authority showing that a discovery rule applies to a UCC breach of contract claim based on the delivery of nonconforming goods. Even if it had, it is undisputed that Bendheim was aware of the delamination problem in 2004. Bendheim provides no justification for its delay in inquiring into why the lites were delaminating or in filing suit against its own vendors after it learned of the possibility of a breach. Bendheim's breach of contract claim is therefore barred under the UCC.

b. *Breach of Warranty Claims*

The statute of limitations for a breach of warranty claim is "four years after the cause of action has accrued." RCW 62A.2-725(1). When a breach of warranty cause of action accrues depends upon whether the warranty is one for repair or replacement or whether the warranty extends to the future performance of the goods:

> A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

RCW 62A.2-725(2). To come within the future performance exception to the four-year limitations period, the warranty must explicitly promise or guarantee the future performance of the goods. *See Holbrook*, 12 P.3d at 642 (quoting *Crouch v. Gen. Elec. Co.*, 699 F. Supp. 585, 593 (S.D. Miss. 1988)).

Here, if Bendheim's breach of warranty claims based on the delamination of the glass are governed by the UCC, they are barred by the statute of limitations. Bendheim conceded at oral argument that it was aware of the delamination problem in 2004, after Williams notified Bendheim that the glass at the NSR was delaminating. (Hr'g Tr. 16:18-17:6, May 14, 2010.) Thus, viewing the evidence in the light most favorable to Bendheim, the court concludes that Bendheim's breach of warranty claims accrued, at the latest, in October 2004, when Bendheim discovered that the glass was delaminating. As a result, the statute of limitations for Bendheim's claims for breach of the warranty of future performance expired four years later, in October 2008. *See* RCW 62A.2-725(2).

Because Bendheim did not sue Cardinal until November 2008, and did not sue Bent Glass until August 2009, its claims for breach of warranty are time-barred.

Further, with respect to Bent Glass, the court notes that Bent Glass's warranty "warrants its laminated glass products for a period of one (1) year from date of manufacture against defects in material or workmanship, which result in edge separation, let-goes, or delamination." (Lerner Decl. Ex. A.) Even if the warranty is construed to be one for future performance, it warrants the performance of the glass for only one year from the date of manufacture, as compared to Cardinal's warranty, which extended for ten years. As a result, any cause of action under Bent Glass's warranty could accrue no later than one year from the date of manufacture of its latest shipment of glass. Bendheim has presented no evidence supporting a finding that any of the glass delaminated within one year of the date of manufacture of the glass.

Bendheim makes two chief arguments in response to Cardinal's and Bent Glass's motions. Neither is convincing. First, Bendheim contends that its cause of action for breach of warranty accrued in 2008, when the Seal report revealed that liquid resin laminate was used in some of the lites. Bendheim, however, bases this argument on a misinterpretation of the court's Prior Order. The court found that because Bendheim's warranty was for future performance and not a warranty to repair and replace, Williams's "cause of action accrued when it discovered, or should have discovered, *that the coating on the glass was delaminating*"—not when Williams discovered or should have discovered that non-SAFLEX lamination was used. (Prior Order at 7 (emphasis added).)

Second, Bendheim argues that the court cannot dismiss its breach of warranty claims against Cardinal and Bent Glass because the court did not grant its motion for summary judgment on Williams's breach of warranty claims against Bendheim. Bendheim fails to recognize, however, that the timeline pertaining to its claims against Cardinal and Bent Glass differs from the timeline pertaining to Williams's claims against Bendheim. Williams presented undisputed evidence in its response to Bendheim's prior motion for partial summary judgment that it discovered Bendheim's breach of warranty in July 2004, when KJI first notified Williams about the delamination problem. (*See* March 2009 Wick Decl. Ex. HH.) Williams then filed its lawsuit against Bendheim on June 20, 2008, shortly before the UCC's four-year statute of limitations expired. Here, by contrast, Bendheim concedes that it learned of the delaminating glass in 2004, but, nevertheless, it waited for more than four years to sue Cardinal and Bent Glass. Because Bendheim delayed in bringing suit, its breach of warranty claims are time-barred under the UCC even though the court found, viewing the evidence in the light most favorable to Williams, that Williams's claims were not barred.

3. Statutes of Limitations under RCW 4.16.080

If the UCC does not apply to Bendheim's claims, then Washington's general statutes of limitations for contract claims will apply. An action based on the breach of a contract that is partly oral and partly written must be brought within three years. RCW 4.16.080(3); *Bogle & Gates, P.L.L.C. v. Holly Mountain Res.*, 32 P.3d 1002, 1004 (Wash. Ct. App. 2001). Here, Bendheim did not dispute Cardinal's and Bent Glass's arguments

that the contracts at issue were partly oral and partly written.[5] Thus, if the contracts are not governed by the UCC, the three-year statute of limitations under RCW 4.16.080(3) will apply. A cause of action for breach of contract generally accrues on breach regardless of when the plaintiff discovers it. *1000 Virginia Ltd. P'ship v. Vertecs Corp*, 146 P.3d 423, 428 (Wash. 2006).

The court finds, viewing the evidence in the light most favorable to Bendheim, that Bendheim's cause of action against Cardinal under RCW 4.16.080(3) accrued, at the latest, on July 7, 1999, when Cardinal delivered its last shipment of glass for the NSR. The statute of limitations expired three years later, in July 2002, before Bendheim sued Cardinal in November 2008. Similarly, Bendheim's cause of action against Bent Glass under RCW 4.16.080(3) accrued, at the latest, on May 9, 2001, when Bent Glass delivered its last shipment of glass for the NSR. The statute of limitations expired three years later, in May 2004, before Bendheim sued Bent Glass in August 2009.

Bendheim contends that the discovery rule applies and that it did not discover a cause of action based on the presence of liquid resin laminate until October 2008. The

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[5] Bendheim did not dispute in its responses or at oral argument that the contracts at issue were partly oral and partly written. Rather, Bendheim contended that if the court granted Cardinal's and Bent Glass's motions on the ground that a three-year statute of limitations applied, it should also grant its motion for summary judgment against Williams on the same ground. (*See* Cardinal Mot. at 10; Resp. to Cardinal Mot. at 15; Bent Glass Mot. at 10; Resp. to Bent Glass Mot. at 16-17; Sonkin Decl. (Dkt. # 89) Ex. C at 7; Hr'g Tr. 17:19-24, May 14. 2010.) In its supplemental briefing, however, Bendheim changes its approach and contends that it entered into written contracts with Bent Glass. The court notes that these arguments are based on evidence that was in the record when Bendheim responded to Bent Glass's motion. (*See* Bendheim Supp. Br. at 4 (citing Mar. 2010 Lerner Decl.).) Thus, the arguments are beyond the scope of the court's order to discuss the effect of recent discovery on the instant motions and will be disregarded.

Washington Supreme Court, however, has strictly limited the application of the discovery rule in breach of contract actions. In *1000 Virginia*, the Court held that the Washington Court of Appeals lacked authority to extend the discovery rule to a breach of contract action, but nevertheless applied the discovery rule to "actions for breach of construction contracts where latent defects are alleged." *1000 Virginia*, 146 P.3d at 430-31. As no party here contends that the contracts at issue were construction contracts, the court declines to apply the discovery rule to this case. Even if the discovery rule applied, however, the Washington Supreme Court has made clear that a "person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose." *Id.* at 431. As Bendheim concedes that it had notice of the delamination problem in October 2004, its cause of action would have accrued at that time, and the three-year statute of limitations would have run in October 2007, before Bendheim filed its suit against Bent Glass.

For the above reasons, viewing the evidence in the light most favorable to Bendheim, the court finds that Bendheim's breach of contract and breach of warranty claims against Cardinal and Bent Glass are time-barred regardless of whether the UCC applies. Therefore, the court grants both Cardinal's and Bent Glass's summary judgment motions with regard to Bendheim's breach of contract and breach of warranty claims.

D. Indemnity Claims

Bendheim alleges claims for "all forms of indemnity and contribution" against both Cardinal and Bent Glass. (2d Am. 3d-Party Compl. ¶¶ 28-30.) A right of implied contractual indemnity "arises when one party incurs a liability the other party should

discharge by the nature of the relationship between the two parties." *Cent. Wash. Refrigeration, Inc. v. Barbee*, 946 P.2d 760, 762 (Wash. 1997). Although the right is not present in every contractual relationship, "a contractual relationship under the U.C.C., with its implied warranties, provides sufficient basis for an implied indemnity claim when the buyer incurs liability to a third party as a result of a defect in the goods which would constitute a breach of the seller's implied or express warranties." *Id.* at 764. "Likewise, a relationship where one party has expressly warranted its goods to another party provides a sufficient basis for an implied indemnity claim." *Urban Dev. Inc. v. Evergreen Bldg. Prod., LLC*, 59 P.3d 112, 116 (Wash. Ct. App. 2003), *aff'd sub nom., Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 90 P.3d 1062 (Wash. 2004); *see also* 42 C.J.S. Indemnity § 31, at 121 (1991) (cited in *Barbee*, and discussing implied indemnity outside of the UCC context). An action based on implied indemnity is an equitable cause of action, separate from an underlying breach of contract cause of action. *Barbee*, 946 P.2d at 762. Accordingly, the statute of limitations for an indemnity claim is not bound to the statute of limitations for the underlying contract claim, and does not begin to run until a party pays damages to a third party, or becomes legally obligated to do so. *Id.* at 765.

1. Cardinal

Cardinal contends that summary judgment is appropriate on Bendheim's indemnity claim because Bendheim has not put forth evidence that it has been damaged. (Cardinal Mot. at 16-17.) Rather, Cardinal asserts, Bendheim has only alleged potential damage that it might incur based on its liability to Williams; and Williams has not yet

quantified its damages to the owner. (*Id.*) Cardinal has not moved for summary judgment on any other ground.

The court finds, viewing the evidence in the light most favorable to Bendheim, that there are genuine issues of material fact regarding Bendheim's damages. Williams has made clear that it is seeking damages from Bendheim based on the delamination of the glass at the NSR and based on Bendheim's provision of nonconforming glass. (*See* Williams Compl.; Mar. 2009 Jayson Decl. Ex. 7 at 7.) Moreover, the court finds that there is a genuine issue of material fact regarding who is responsible for the delaminating glass. First, Mr. Wick contends that evidence shows that Cardinal cut glass to size first, hand-washed each piece of glass, and then laminated the glass. (Apr. 2010 Wick Decl. ¶ 5 & Ex. C; *see also* Apr. 2010 Pitkethly Decl. (Dkt. # 105) ¶¶ 6-7.) Mr. Wick believes that because Cardinal could not use its mechanized glass washing equipment, there was contamination of the interlayer that contributed to the delamination. (*Id.* ¶ 6.) Second, according to Mr. Wick, BGD provided only about 15 percent of the glass used at the NSR, and according to KJI, 30 percent of the glass has delaminated. (Mar. 2010 Wick Decl. ¶ 12; Mar. 2009 Jayson Decl. Ex. 7 at 7.) As a result, according to Bendheim, Cardinal had to be responsible for at least half of the delaminating glass. Bendheim asks the court to compare apples and oranges, as the 15 percent figure for the percentage of glass provided by Bent Glass is based on square footage, while the 30 percent figure is based on the number of lites. (*See id.*) Regardless, having reviewed the extensive record in this case, the court determines, viewing the facts in the light most favorable to Bendheim, that there is a genuine issue of material fact regarding whether each vendor is

responsible for delamination of the glass, and if so, to what extent. The court therefore denies Cardinal's motion for summary judgment on Bendheim's indemnity claim.

2. Bent Glass

Bent Glass contends that, under *Barbee*, Bendheim cannot establish that the relationship between the parties is one that would lead to implied indemnity. *Barbee* states that "a contractual relationship under the U.C.C., with its implied warranties, provides sufficient basis for an implied indemnity claim when the buyer incurs liability to a third party as a result of a defect in the goods which would constitute a breach of the seller's implied or express warranties." *Barbee*, 946 P.2d at 764. Bent Glass contends that it only warranted against delamination of its glass within one year of manufacture and that it disclaimed all implied warranties. Thus, Bent Glass argues, because Bendheim has presented no evidence that any of the glass delaminated within one year of manufacture, there was no "defect in the goods which would constitute a breach of the seller's implied or express warranties" as required for implied indemnity to lie.

Bendheim does not respond to this argument. Instead, Bendheim quotes passages from *Barbee* without relating them to the context of this case and points to no facts which, viewed in its favor, would show that any of the glass delaminated within the warranty period. (*See* Resp. to Bent Glass Mot. at 12-13.) Bendheim's sole argument appears to be that the statute of limitations has not yet run on its indemnity claim, but Bent Glass did not raise this challenge in its motion. (*See id.* at 13.) The court finds, therefore, that Bendheim has not met its burden to establish a genuine issue of material

fact, and grants Bent Glass's motion for summary judgment on Bendheim's indemnity claim.

E. Contribution Claims

Bendheim alleges claims for contribution under RCW 4.22.040 against both Cardinal and Bent Glass. RCW 4.22.040 provides:

> A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. . . . The basis for contribution among liable persons is the comparative fault of each person . . . .

RCW 4.22.040(1).

Cardinal contends that summary judgment is appropriate on Bendheim's contribution claim on the sole ground that Bendheim has not established damages.[6] (*See* Cardinal Mot. at 16-17; Cardinal Reply at 2.) As discussed above, the court finds, viewing the evidence in the light most favorable to Bendheim, that there are genuine issues of material fact regarding Bendheim's damages. The court therefore denies Cardinal's motion for summary judgment on Bendheim's contribution claim.

The court notes that it is not clear that RCW 4.22.040 applies to claims for breach of contract and breach of warranty. Even if RCW 4.22.040 does apply to the claims at issue in this case, Bendheim does not appear to have alleged facts supporting a finding

[6] Bent Glass, for its part, did not discuss Bendheim's contribution claim in its motion for summary judgment. The court therefore makes no ruling regarding summary judgment on Bendheim's claim for contribution against Bent Glass.

that it is jointly and severally liable with Cardinal and Bent Glass for the harm suffered by Williams. Bendheim will be required to clear these hurdles before trial.

E. Limitations of Liability

Washington's UCC permits parties to a contract to agree to "limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." RCW 62A.2-719(1). This section also provides, however, that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title." RCW 62A.2-719(2). The Washington Supreme Court has applied the UCC by analogy to service contracts; thus, the parties' disputes regarding whether the UCC governs their contracts does not affect the court's analysis. *Puget Sound Fin., LLC v. Unisearch, Inc.*, 47 P.3d 940, 946 n.14 (Wash. 2002).

Contractual limitations on damages are generally valid unless they are unconscionable. *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 314 (Wash. 2002). Limitations of liability for incidental and consequential damages in purely commercial transactions are prima facie conscionable, and the burden of establishing unconscionability falls on the party attacking the clause. *Am. Nursery Prods., Inc. v. Indian Wells Nursery*, 797 P.2d 477, 480-81 (Wash. 1990); *Puget Sound Fin.*, 47 P.3d at 944 n.12 (noting that exclusionary clauses and liability limitation clauses are subject to the same analysis). Bendheim does not contend that Cardinal's and Bent Glass's limitations of liability in the warranty agreements were unconscionable.

1. Cardinal

Cardinal contends that any liability it may have to Bendheim is limited to the replacement cost of the glass, as provided in the warranty agreement between the parties. Bendheim does not challenge this assertion. Instead, Bendheim repeats the arguments it made in its own motion seeking summary judgment limiting Williams's remedies, and contends that, if the court grants Cardinal's motion for summary judgment on limitation of liability, it must revise its Prior Order denying Bendheim's motion for summary judgment against Williams. To support this contention, Bendheim cites excerpts from Mr. Wick's deposition in which he discussing his interpretation of the warranty Bendheim made to Williams. (*See* Resp. to Cardinal Mot. at 16-19 (quoting June 2009 Rosenberg Decl. (Dkt. # 54) Ex. 1).)

As Bendheim agrees with Cardinal that the language of the warranty is effective to limit the buyer's remedies to those set forth in the warranty agreement, the court grants Cardinal's motion for summary judgment regarding limitation of liability. The court declines, however, to modify its prior ruling denying Bendheim's motion for summary judgment against Williams absent briefing from Williams. Rather, Bendheim may make a renewed motion for summary judgment based on the record in this case as it has developed since the court's Prior Order.

2. Bent Glass

Bent Glass also contends that its warranty was effective to limit its liability to Bendheim. Bent Glass's written warranty states that it warrants its laminated glass products for "[one] year from date of manufacture against defects in material or

workmanship, which result in edge separation, let-goes, or delamination," and that the buyer's remedies were limited to replacement of the glass or a refund of the purchase price. (Mar. 2010 Lerner Decl. Ex. A.) Bent Glass asserts that, because there is no evidence that any of its glass delaminated within one year of manufacture, it has no liability to Bendheim.[7]

Bendheim does not directly respond to Bent Glass's arguments. Instead, as it did in its response to Cardinal's motion, Bendheim asserts that the court must deny Bent Glass's motion because it denied Bendheim's motion for summary judgment regarding its limitation of liability to Williams. Bendheim again fails to recognize the factual differences between its case against Bent Glass and Williams's case against it. First, there are critical differences between the Bent Glass-Bendheim warranty and the Bendheim-Williams warranty. The court denied Bendheim's motion for summary judgment based on its determination that there was a dispute of material fact regarding whether the term "laminated glass products ordered" in the Bendheim-Williams warranty referred to laminated glass in general or specifically to glass laminated with SAFLEX. (Prior Order at 9.) As a result, the court could not determine on the record before it whether the delivery of glass laminated with liquid resin caused the warranty to fail its essential purpose. (*Id.*) Here, by contrast, Bent Glass's warranty covered "its laminated glass products" for a period of one year from manufacture. (Lerner Decl. Ex. A.) Thus,

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[7] The earliest cited evidence of delamination is a July 2004 telephone call from Scott White of KJI to Mr. Wick in July 2004. (Mar. 2009 Wick Decl. ¶ 37.)

the ambiguity the court found in the phrase "products ordered" in Bendheim's warranty, when viewing the facts in the light most favorable to Williams, does not exist here. Second, Bendheim presents no facts which, viewed in its favor, would support a finding that circumstances caused the remedies in Bent Glass's warranty to fail their essential purpose.[8] Rather, Bent Glass relies solely on the court's discussion in its Prior Order of Bendheim's warranty to Williams. Because Bendheim has not met its burden to establish a genuine issue of material fact, the court grants Bent Glass's motion for summary judgment regarding limitation of liability.

F. Bendheim's Rule 54(b) Motion

Bendheim contends that, to the extent the court grants summary judgment to Cardinal in ruling on the instant motion, it should also grant its motion to modify the court's Prior Order denying Bendheim's motion for summary judgment on Williams's claims pursuant to Federal Rule of Civil Procedure 54(b). Rule 54(b) provides, in relevant part, that:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

As the court has explained above, there are important factual differences between the Bendheim-Cardinal relationship and the Williams-Bendheim relationship. Thus, it is

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[8] *Compare* Dkt. # 37 at 13-16 (Williams's response to Bendheim's motion for summary judgment) *with* Resp. to Bent Glass Mot. at 17-19.

neither inconsistent nor unfair for the court to grant Cardinal's motion for summary judgment after denying Bendheim's motion. Moreover, as the court's prior order involved the dispute between Williams and Bendheim, rather than the dispute between Bendheim and Cardinal, the court declines Bendheim's invitation to modify its Prior Order absent briefing from Williams. The court therefore denies Bendheim's Rule 54(b) motion.

G. Bent Glass's Request for Attorneys' Fees

Bent Glass contends that it is entitled to an award of attorneys' fees pursuant to Washington's long arm statute, which provides:

> In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

RCW 4.28.185(5). Bendheim does not respond to Bent Glass's request.

The court denies Bent Glass's motion for attorneys' fees. The statute authorizes an award of reasonable attorneys' fees where the defendant "prevails in the action." *Id.*; *Scott Fetzer Co., Kirby Co. Div. v. Weeks*, 786 P.2d 265, 268 (Wash. 1990). Here, although Bent Glass has prevailed on the instant motion, it has not "prevail[ed] in the action" because Bendheim's contribution claim still remains for trial. The denial is without prejudice against Bent Glass renewing its motion should it eventually prevail in the action.

III. CONCLUSION

For the foregoing reasons, the court GRANTS in part and DENIES in part Cardinal's motion for summary judgment (Dkt. # 93) and GRANTS Bent Glass's motion for summary judgment (Dkt. # 88).

Dated this 13th day of July, 2010.

JAMES L. ROBART
United States District Judge